

**ADVANCED TESTING TECHNOLOGIES, INC.**

110 Ricefield Lane, Hauppauge, NY 11788-2008 Phone: (631) 231-8777 Fax: (631) 231-7174

2001-014-180

June 4, 2001

Ltr ATTI/01-0062

Via E-Mail 2001-014@gsa.gov

General Services Administration
FAR Secretariat (MVP)
ATTN: Laura Duarte
1800 F Street, N.W., Room 4035
Washington, D.C. 20405

Re: Comments on FAR Case 2001-014 (Revocation)

Dear Ms. Duarte:

Advanced Testing Technologies, Inc. ("ATTI"), a leader and innovator in the design, development and protection of Automatic Test Equipment, appreciates the opportunity to comment on the final rule published at 65 Federal Register 80255, December 20, 2000 (the "Final Rule"). However, while ATTI commends the Federal Acquisition Regulatory Council ("FAR Council") on attempting to design a rule to deter contracting officers from awarding contracts to companies that have a record of "repeated, pervasive, or significant violations of legal requirements," ATTI respectfully submits these comments to support the revocation of the Final Rule.

ATTI believes that the Final Rule, as drafted, is arbitrary, capricious and contrary to law. In addition, ATTI believes that any benefits of the Final Rule are outweighed by its significant costs to prospective contractors. Therefore, as discussed in more detail below, ATTI respectfully submits that the Final Rule should be revoked.

TO: FAR Secretariat
DEPT. _____
CO. _____
FAX 202/501-4067

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FROM HMG/ATTI
DATE 6/10/01

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ADVANCED TESTING TECHNOLOGIES, INC.

110 Ricefield Lane, Hauppauge, NY 11788-2008 Phone: (631) 231-8777 Fax: (631) 231-7174

June 4, 2001
Ltr ATTI/01-0063

Via E-Mail 1999-010@gsa.gov

General Services Administration
FAR Secretariat (MVP)
Attention: Laura Duarte
1800 F Street, N.W., Room 4035
Washington, D.C. 20405

Re: Comments on FAR Case 1999-010 (Stay)

Dear Ms. Duarte:

Advanced Testing Technologies, Inc. ("ATTI"), a leader and innovator in the design, development and protection of Automatic Test Equipment, respectfully submits these comments to extend the length of the stay contained in FAR Case 1999-010 (Stay). FAR case 1999-010 stayed the final rule published in the Federal Register at 65 FR 80255, December 20, 2000 (the "Final Rule"), until the earlier of (i) 270 days from April 3, 2001, or (ii) the proposed rule (entitled "Contractor Responsibility, Labor Relations Cost, and Costs Relating to Legal and Other Proceedings" published concurrently with FAR Case 1999-010) is finalized.

ATTI believes that 270 days is an insufficient amount of time to ensure compliance with the Final Rule. In order to ensure compliance with the Final Rule, ATTI will need more time to establish recordkeeping and compliance programs. The necessity of establishing these programs is underscored by the potential False Statements Act liability and unallowable cost liability that may result from signing "false" certifications or failing to account properly for newly-unallowable costs.

Finally, given the significant costs involved in complying with the Final Rule, ATTI respectfully requests the Final Rule to be stayed indefinitely or, at a minimum, until prospective contractors are able to provide an informed estimate of the amount of time that it will take to establish and implement the necessary policies and programs to comply with the Final Rule.

Therefore, ATTI respectfully submits that the Final Rule should be delayed indefinitely or, at a minimum, until prospective contractors are able to provide an informed estimate of the amount of time needed to implement the necessary compliance policies and programs.

Sincerely,

Hector M. Gavilla
President

HMG:vg

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1. The Final Rule is Arbitrary and Capricious.

The Federal Acquisition Regulations ("FAR") provide that "purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only." FAR 9.103(a). To be determined "responsible," the Final Rule states that a prospective contractor must "[h]ave a satisfactory record of integrity and business ethics including satisfactory compliance with the law including tax laws, labor and employment laws, environmental laws, antitrust laws, and consumer protection laws." FAR 9.104-1(d) (stayed effective April 3, 2001). In determining whether a prospective contractor has a satisfactory record of integrity, the Final Rule states that contracting officers may examine "all relevant credible information." FAR 9.104-3(c) (stayed effective April 3, 2001). "All relevant credible information" includes not only convictions of and civil judgments rendered against the prospective contractor for certain enumerated items, but also "civil or administrative complaints or similar actions filed by or on behalf of a federal agency, board or commission, if such action reflects an adjudicated determination by the agency." FAR 9.104-3(c)(1)(iii) (flush language).

ATTI respectfully submits that this "responsibility criteria" is arbitrary and capricious for a number of reasons. First, it requires contracting officers to examine and interpret areas of the law in which they have no expertise, training or resources to make a determination that a prospective contractor has satisfactorily complied with all of the specified areas of law. Second, because the Final Rule permits contracting officers to consider "all relevant credible information" (and not just final judgments, decisions or convictions), contracting officers will be able to make determinations of non-responsibility based on alleged violations of the law with respect to which prospective contractors have not yet exercised their rights of due process. Third, and equally important, there is no nexus between a prospective contractor's record of compliance with the law and the prospective contractor's general ability to perform a government contract. The broad array of laws examined by the contracting officer has no relation to a contractor's performance ability under government contracts. Finally, there are more efficient means of enforcing the broad array of laws examined by the contracting officer, such as enforcement by the agencies entrusted with administering and interpreting such areas of law and the debarment process.

Based on the above, ATTI believes that the Final Rule does not provide sufficient guidelines with respect to its implementation and that there is no justification for including the additional areas of law in the Final Rule.

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2. *The Final Rule is Contrary to Law.*

In addition to being arbitrary and capricious, the Final Rule is contrary to existing remedial laws. Congress expressly delegated the enforcement and interpretation of the broad array of laws implicated by the Final Rule to specific federal agencies. By allowing contracting officers to impose an additional remedy for violations and alleged violations of such laws (i.e., denying government contracts), the Final Rule effectively allows contracting officers to encroach on the specific remedial schemes that have been established in each of the areas of law.

Further, the changes to Part 31 of the FAR conflict with the Major Fraud Act of 1988 (the "Fraud Act"), which dictates when legal costs are recoverable, and are internally inconsistent with other provisions of the FAR. The Fraud Act makes legal costs incurred by a contractor in a civil or administrative governmental proceeding in which fraud (or a similar conduct) was not alleged unallowable only if the proceeding resulted in the imposition of a monetary "penalty".^{1/} For this purpose, the term "penalty" does not include restitution, reimbursement or compensatory damages.^{2/} The proposed change to FAR 31.205-47 would violate this statute by making costs incurred in civil or administrative proceedings brought by a government not involving fraud (or a similar conduct) unallowable where the contractor simply violated, or failed to comply with a law or regulation. In this regard, the proposed change does not require the imposition of a monetary penalty to make legal costs unallowable and, thus, is in violation of the Fraud Act.

Similarly, FAR §22.101-1(b) mandates that "[a]gencies shall remain impartial concerning any dispute between labor and contractor management." In furtherance of this mandate, the newly designated FAR §31.205-21(a) provides that "costs incurred in maintaining satisfactory relations between the contractor and its employees, including costs of shop stewards, labor management committees, employee publications, and other related activities, are allowable." However, the newly added FAR §31.205-21(b) provides that costs "incurred for activities that assist, promote, or deter unionization are unallowable." Read together, it appears that certain union cost would fall into both subsections of FAR §31.205-21. In this regard, these two provisions are internally inconsistent.

For these reasons, ATTI respectfully submits that the Final Rule is contrary to existing law.

^{1/} See 10 U.S.C. § 2324(k).
^{2/} *Id.*

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3. The Benefits of the Final Rule Are Outweighed by Its Significant Costs.

Finally, ATTI believes that any benefits of the Final Rule are significantly outweighed by their costs to prospective contractors. In order to comply with the Final Rule, prospective contractors (like ATTI) will need to design, install, maintain or otherwise implement a system to gather and monitor legal violations or alleged violations of law that (a) require an affirmative certification under the Final Rule or (b) may be considered by contracting officers in responsibility determinations. Given the vagueness of the broad array of laws (e.g., consumer protection laws) cited by the Final Rule, ATTI and other contractors likely will spend a significant amount of time identifying the violations that require certification. Moreover, with respect to the amendments to Part 31 made by the Final Rule, changes will need to be made to current accounting practices to ensure the proper accounting treatment of all newly unallowable costs for legal expenses and activities in connection with unionization.

Thus, ATTI believes that the Final Rule is not justified from a cost-benefit perspective.

4. Conclusion.

Based on the reasons discussed above, ATTI respectfully submits that the Final Rule should be revoked because it is arbitrary, capricious and contrary to existing law, and it is not justified from an implementation or cost-benefit perspective.

Sincerely,

A handwritten signature in black ink, appearing to read 'Hector M. Gavilla'.

Hector M. Gavilla
President

HMG:vg

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